

## Legislative Update: Codification of Requirements for Disposition or Alternative Use of Property and Interests Subject to Article 97

### February 16, 2023

On November 17, 2022, the Governor signed into law Chapter 274 of the Acts of 2022, known as the Public Lands Preservation Act (the “Act”). The Act adds Section 5A to Chapter 3 of the Massachusetts General Laws, and sets forth the requirements municipalities must follow when changing the use or disposing of property subject to Article 97 of the Amendments to the Constitution of the Commonwealth (“Article 97”). The provisions of the Act mirror a long-standing policy of the Executive Office of Energy and Environmental Affairs (“EOEEA”) on the disposition or change of use of properties subject to Article 97.

Article 97 was approved on November 7, 1972, and applies retroactively. It states, in relevant part, that “[t]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.” Article 97 further provides that “[l]ands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.”

In essence, Article 97 provides that if a municipality acquires land for a purpose protected under Article 97, it may not convey that land or change its use without a two-thirds roll call vote of each house of the Legislature. Recent cases have held that Article 97 may also apply to land that, after its original acquisition, is expressly dedicated to purposes protected under Article 97. See Mahajan v. Department of Environmental Protection, 464 Mass. 604 (2013).

The Act sets forth a three-step process that must be followed when a municipality disposes of or changes the use of Article 97 land. A municipality must:

- (1) Notify the public and the Secretary of EOEEA (“Secretary”) of the planned disposition and conduct an alternatives analysis to show that there is no feasible alternative to disposition or change in use. This analysis must be submitted to the Secretary;
- (2) Identify replacement property which is not already subject to Article 97 that has equal or greater natural resource value, acreage, and monetary value. Natural resource value is determined by the Secretary, and acreage and monetary value is determined by an appraisal of the fair market value or value in use, whichever is greater; and

(3) Take, acquire, or dedicate the replacement land or interest identified in perpetuity for Article 97 purposes.

The Secretary may waive or modify the second and third requirements under two, limited, circumstances:

- The disposition is only for the transfer of legal control between two public entities and does not involve any other change; or
- The parcel is not of significant natural resource and recreation value, is less than 2,500 square feet, and the transfer serves a significant public interest.

Additionally, the Act allows funding, or a combination of funding and replacement land, to be provided instead of replacement land in certain circumstances. This is only allowed if the Secretary reports the following findings to the Legislature:

- The proposed disposition or change in use serves a significant public interest;
- The proposed disposition or change in use will have no adverse impacts on an “Environmental Justice Population,” as defined in M.G.L. c. 30, § 62;
- An alternatives analysis has been submitted to the Secretary which demonstrates that there is no feasible alternative to disposition or change in use; and
- There is no feasible replacement land which meets the requisite criteria, as discussed above.

If all four requirements are found by the Secretary, a public entity may then provide funding in combination with or instead of replacement land, subject to the following conditions:

- The amount of funding provided is no less than 110% of the fair market value or value in use of the property, whichever is greater. The fair market value is determined by the Secretary following an independent appraisal;
- For municipal land, the funding must be held in the Community Preservation Fund or a similar segregated account established for land preservation purposes, and dedicated solely for the acquisition of land for Article 97 purposes; and
- The funds must be used within three years to acquire replacement land in a comparable location and dedicated in perpetuity for Article 97 purposes.

The Secretary must issue an annual report by December 15th of each year of all instances in which funding was provided instead of replacement land, said report to include the amount of funds provided, the account which the funds were deposited into, whether or not the funds have been used to acquire replacement land, and, if so, a description of the land acquired.

Lastly, a procedure is laid out for petitioning the Legislature to authorize the disposition or use for another purpose of Article 97 property. All petitions must include:

- The alternatives analysis;
- A description of the replacement land or interest, if applicable;

- A copy of the appraisal;
- A copy of any waiver or modification granted, if applicable; and
- A copy of the report of the findings of the Secretary which would allow for funding to be provided instead of a replacement property, if applicable.

The Act codifies a long-standing administrative policy of EOEEA for the “No Net Loss” of Article 97 land. It is intended to bring transparency and accountability to the process where Article 97 property is conveyed or converted to a different use, and ensures that public lands cannot be developed for other uses, absent an analysis of alternatives and the dedication of equivalent natural resource value in replacement.

If you have any further questions about this Act, please contact your KP Law Attorney at 617-556-0007.

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